Ne bis in idem and Administrative Sanctions

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Ne bis in idem and administrative sanctions: *Bonda*

Case C-489/10, *Prokurator Generalny* v. *Lukasz M. Bonda*, Judgment of the Court of Justice (Grand Chamber) of 5 June 2012, nyr.

1. Introduction

The principle of *ne bis in idem* has played a key role in protecting human rights within the European Union. It has long been recognized by the Court of Justice as part of the general principles of Union law and its safeguard has been closely linked to the good functioning of the internal market. According to the Court its observance ensures "that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement".[1] The importance of the right not to be prosecuted and sanctioned twice for the same offence has been boosted by the recent changes in the human rights landscape introduced by the Treaty of Lisbon. This right is now expressly provided by Article 50 of the EU Charter of Fundamental rights: thus, it is expected that its relevance will become even more marked, especially when allegations of its infringement are made in respect of measures adopted by the Member States in furtherance of their EU law obligations.

This case note analyses exactly such a situation: the *Bonda* preliminary ruling concerns the compatibility with the principle of *ne bis in idem* of the action of domestic agencies competent for administering Union funds and criminal prosecution under domestic law for the same facts. It will be argued that the principle of *ne bis in idem* remains fully relevant in these cases and will apply if all the criteria of identity of offender, unity of conduct and identity of "legal interest protected" are met. Paramount in this assessment is the question whether the fresh set of proceedings initiated against the same individual is "criminal" in nature. It will be shown that the Court adopted a rigorous approach to this question which was strongly inspired by and therefore consistent with the principles dictated by the European Convention on Human Rights.[2]

1. See e.g. Case C-150/05, *Van Straaten*, [2006] ECR I-9327, para 57; see also, *inter alia*, Case C-469/03, *Miraglia*, [2005] ECR I-2009, paras. 33–35.
2. See Ser. A No. 22, *Engel* v. *the Netherlands*, judgment of 8 June 1976, [1979–1908] 1 EHRR 647, especially paras. 81–82.

Thereafter, the case note briefly addresses more general issues concerning the scope of application of the EU Charter of Fundamental Rights when alleged human rights infringements are imputable to Member States' actions aimed at "implementing" EU law. It will be argued that in *Bonda* the Court of Justice upheld its commitment to applying the EU human rights standards across the whole spectrum of the Union legal system, regardless of whether the Treaty goals were being achieved directly by Union agencies or indirectly by the Member State authorities. It will also be illustrated that the preliminary ruling "promises well" for the future of human rights adjudication within the scope of Union law, since it is strongly rooted in the ECHR *acquis* and fully consistent with the requirement of "homogeneity" provided in Article 52(3) of the EU Charter.

2. Factual background

The preliminary ruling was on a reference from the Polish Supreme Court, which had to decide on the appeal lodged by Mr Bonda against the decision of the public prosecutor to seek a conviction for his incorrect declarations as to the size of land destined for agricultural use. This declaration was indispensable for the respondent to obtain the "single area payment" to which he was in principle entitled under the Common Agricultural Policy. Following an administrative check, the Polish authorities had found a discrepancy of almost 100% between the land effectively employed by Mr Bonda for agricultural use and the size formally declared for aid purposes. As a result, Mr Bonda had been ordered to repay the excess aid and had been declared ineligible to receive any aid on the current year (2005), in accordance with Article 24 of Regulation (EC) 1782/2003. In addition, according to Article 138 of Regulation (EC) 1973/2004, any aid that would have been granted to Mr Bonda in the following 3 years would be diminished in proportion to the amount of subsidies that had been overpaid to him, as a result of his incorrect declarations in 2005.

Mr Bonda challenged the authorities' decision to prosecute him for "subsidy fraud", a criminal offence under Polish law.[3] He pleaded that both the total exclusion from aid eligibility, imposed on him in 2005, and the limits on any aid he would have been entitled to receive in the following three years constituted a "criminal penalty". He consequently challenged the criminal prosecution launched against him, on the ground that it was incompatible with his right against double jeopardy.

3. Judgment, para 19.

On appeal, the Polish Supreme Court acknowledged that the criminal prosecution had originated out of the same facts that had prompted the administrative authorities to declare Mr Bonda ineligible for aid, and in that context it emphasized that according to Article 138 of Regulation 1973/2004 this "sanction" of ineligibility was not of a "criminal nature". However, the Court, mindful of the need to provide "effective protection" of the individual's human rights, had to satisfy itself that the sanction of exclusion from aid eligibility was not "criminal" in nature. It made a reference to the Court of Justice, querying whether the measure adopted against Mr Bonda by the domestic agricultural authorities was "criminal" or "administrative".

3. The Opinion of the Advocate General

In her Opinion,[4] Advocate General Kokott first considered whether the EU prohibition of double jeopardy was relevant for the case at hand. The Advocate General was conscious of the importance of *ne bis in idem* as one of the general principles of EU law and one of the rights enshrined in the EU Charter of Fundamental Rights.[5] However, she was also conscious of the need to establish that the EU law standards, as enshrined in Article 50 of the EU Charter, would be applicable to Mr Bonda's case. Thus, she expressed the view that the first question to address had to be whether, according to the Charter's horizontal provisions, "the facts of the case demonstrated a connection with European Union law".[6]

Advocate General Kokott observed that the "administrative penalty" had been imposed directly as a result of the application of Regulation 1973/2004; on the other hand, the criminal sanction with which Mr Bonda had been threatened was provided by domestic legislation enacted by the Polish Parliament and penalizing "subsidy fraud", i.e. fraudulent practices designed to have an adverse impact not only on State funds but also on the budget of the Union. On this specific point, the Advocate General emphasized that this offence had been introduced after the accession of Poland to the EU with the express objective of protecting the integrity of Union finances.

Advocate General Kokott consequently held that when the domestic authorities decided to prosecute individuals who, like Mr Bonda, had been accused of subsidy fraud on account of incorrect declarations rendered in order to obtain CAP aid, they were acting within the scope of Union law and

4. Opinion given on 15 Dec. 2011.

5. Ibid., para 13; see also, *inter alia*, Case C-17/10, *Toshiba and others* v. *Commission*, judgment of 14 Feb. 2012, nyr, especially para 94.

6. Ibid., para 15.

should therefore be bound by the fundamental rights' safeguards provided by EU law. In light of the foregoing, the Advocate General concluded that the protection against double jeopardy should be applicable to the case, on the ground that since the criminal sanctions aimed to fulfil EU objectives the attending proceedings should conform to uniform requirements of respect for fundamental rights provided by the EU general principles.[7]

Thereafter Advocate General Kokott examined the question of the nature – whether criminal or otherwise – of the penalties provided directly by EU law, i.e. the sanction of exclusion from aid eligibility. She recalled that according to the ECJ's case law, the sanction had to be reviewed in light of two criteria, i.e. "the nature of the breaches" in question and the "objective" that the sanction pursued.[8] In respect of the former, she held that since the infringement could be imputed only to "economic operators who had freely chosen to" rely on the aid scheme, the penalty could not be regarded as "criminal", as it lacked the "general scope of application" typical of criminal penalties.[9] As to the latter, the Advocate General expressed the view that since the exclusion from aid eligibility aimed to avoid financial irregularities in the provision of financial assistance and thereby to protect the stability of a key part of the EU budget, it lacked the "punitive" objective typical of a "criminal" sanction.[10]

The Opinion, however, went beyond the consideration of the penalty in light of domestic law: Advocate General Kokott was conscious of the fact that the case law of the European Court of Human Rights[11] was relevant to her appraisal due to the requirement of "homogeneity" between EU and ECHR standards, enshrined in Article 52(3) of the EU Charter.[12] Thus, she expressed the view that the domestic law assessment should be complemented by an appraisal of the sanction conducted under the other criteria identified as relevant by the Strasbourg court, namely, whether the rule infringed had general scope and whether the sanction was of a sufficient degree of severity as to justify its qualification as "criminal" in nature.[13]

The Advocate General opined that the sanction of exclusion from aid eligibility did not meet either of the criteria. In her view, the rules infringed were only applicable to a limited category of economic operators, namely those farmers who had decided to apply for financial assistance coming from the Union and administered via the domestic authorities. She reaffirmed that

7. Ibid., paras. 19–20; see also para 24.
8. Ibid., para 37.
9. Ibid., para 38.
10. Ibid., para 39.
11. Ibid., paras. 43, 45–50; see e.g. *Engel* v. *the Netherlands*, cited *supra* note 2, paras. 80–82.
12. Ibid., see also para 43.
13. Ibid., paras. 48–49.

the penalty fulfilled a "protective" function *vis-à-vis* the viability of the scheme for the provision of agricultural aid: on this point, it was emphasized that excluding temporarily (either wholly or in part) a less "trustworthy applicant" from eligibility to receive aid evidenced the EU legislature's intention to safeguard the Union budget and to secure the regular administration of the scheme, and not to punish "mendacious applicants".[14]

Finally, the Advocate General denied that the criterion of "severity" of the sanction had been fulfilled. In her view, the penalty of exclusion from aid eligibility did not affect the "property rights" of the applicant, but only his or her expectation to draw a benefit.[15] She emphasized, however, that any such expectation would not have been "legitimate" on the ground that the applicant in the case at hand had already made incorrect declarations in a previous application and, therefore, knew that he would not have been entitled to any aid in the same year and to a reduced amount of aid in the following three years.

In light of the foregoing, Advocate General Kokott concluded that the exclusion from aid eligibility was not criminal in nature and did not preclude the judicial authorities prosecuting Mr Bonda for "subsidy fraud".[16] She added that taking a different view would result in the Member States being unable to tackle even the most egregious forms of fraud against the EU budget – whether the latter was administered directly or via national agencies.[17]

4. The ruling of the Court

It should be highlighted that in contrast to the Opinion, the Court only addressed the question of whether the sanction of exclusion from aid eligibility was criminal in nature and did so ostensibly in light of its own *acquis*. The Court first recalled that in accordance with its existing approach "penalties laid down in rules of the Common Agricultural Policy" were not of a "criminal" nature:[18] it emphasized that these sanctions were only concerned with preventing the "numerous irregularities . . . committed in the context of agricultural aid" and thereby defending the good functioning of aid schemes as a means of [*inter alia*] "stabilizing markets [and] . . . supporting the standards of living of farmers."[19] It added that these rules were only applicable

14. Ibid., para 54.
15. Ibid., para 71.
16. Ibid., paras. 78–79.
17. Ibid., para 77; see also paras. 73–74.
18. Ibid., paras. 26–27.
19. Ibid., para 29.

to those economic entities that "[had] freely chosen to take advantage of agricultural aid".[20]

The Court conducted a separate analysis of the total exclusion from aid eligibility *vis-à-vis* the "partial" exclusion for the three years following the year in which incorrect declarations had been made. In respect of total exclusion, it held that this penalty was directly related to the need to protect the sound financial management of the scheme by immediately excluding "untrustworthy applicants" from the pool of aid receivers; as to the partial exclusion, the Court reiterated that this sanction was "integral" to the functioning of the CAP schemes, as it ensured that applicants who had not provided sufficient "guarantees of probity" in the recent past were excluded from obtaining financial assistance.[21] On that basis the Court concluded that, just as with total exclusion, this sanction pursued an objective other than deterrence and should therefore be distinct from other sanctions applicable to individuals who had made false or fraudulent declarations.

The Court, however, did not stop at these considerations but, like the Advocate General, addressed also the questions arising from the application of the other requirements laid down in Article 4, Protocol VII of the ECHR and identified by the European Court of Human Rights. Having excluded that the penalty in issue was defined as "criminal" by domestic legislation, the Court re-affirmed that it did not have a "punitive" function on account of being both of limited application and consistent with the objective of "protecting the sound management of EU funds".[22]

Finally, the Court dealt with the question of whether the sanction of exclusion from aid eligibility was sufficiently "severe" as to meet the requirements of a "criminal penalty". It was found that the sanction only resulted in the deprivation of the "prospect of obtaining aid" for those applicants who had been found responsible for incorrect declarations in the recent past.[23] The Court reiterated that an applicant in this position could not have claimed a "legitimate expectation" to receive financial assistance, since he or she had already infringed the rules governing the scheme within the past three year period.[24] It added that in any event, unless an applicant in the position of Mr Bonda had submitted a fresh bid for aid within the three years following his incorrect declarations, he would not have been affected by the limits on the eligibility for aid stemming from earlier incorrect declarations. In light of the foregoing the Court of Justice concluded that the measure of

20. Ibid., para 30.
21. Ibid.
22. Ibid., para 40.
23. Ibid., para 43.
24. Ibid., para 44.

exclusion from aid eligibility, either total or partial, following the rendering of incorrect declarations as part of the application process, did not have a "criminal nature".[25]

5. Comments

5.1. *The meaning of a "criminal charge" for ne bis in idem purposes: "Squaring the circle" with the Convention acquis?*

The *Bonda* preliminary ruling highlighted many questions concerning the applicability of the principle of *ne bis in idem* and in that context raised issues relating to the interplay of EU fundamental rights' principles with the standards enshrined in other human rights instruments, especially the ECHR.[26] These questions are especially relevant because the right not to be prosecuted and sanctioned twice for the same offence is provided by Article 50 of the EU Charter of Fundamental Rights,[27] and, via its horizontal provisions, the Charter ensures that the standards of protection of common rights should be homogenous to those enshrined in the Convention.

This subsection will consider the interpretation of the constituent elements of this principle and in particular examine the question of whether the ECJ's position is compatible with the ECHR. As was made clear by the Court of Justice itself, the right against double jeopardy is only applicable if both sanctions are "criminal" in nature. But what is a "criminal sanction"? It is clear from the preliminary ruling that three substantive criteria are involved, namely whether the offence is classified as "criminal" by domestic law, whether the sanction to be imposed is of general application and whether, by reason of its severity, its impact is sufficiently serious as to justify a finding of its "criminal" character.[28]

It is also apparent that the Court of Justice fashioned its "substantive" approach to determining the nature of a sanction very much in light of the framework for analysis used by the European Court of Human Rights. For instance, in *Gradinger* the Strasbourg Court held that factors such as the classification of an infringement as a "criminal offence" under domestic law, the nature of the sanction resulting from it and especially the possibility for it to be accompanied or replaced by "committal to prison", would be decisive for

25. Ibid., para 46.

26. See e.g. *Toshiba*, cited *supra* note 5 (in the area of competition law); see also, *inter alia*, *Miraglia*, cited *supra* note 1 (in respect of Art. 54, Schengen Convention).

27. *Toshiba*, cited *supra* note 5, Opinion, paras. 99–100.

28. Judgment, para 37.

a finding that prima facie "administrative" proceedings were actually of a "criminal nature".[29] In the later *Tomasovic* judgment it was added that the fact that certain norms were applicable to "all citizens" and clearly pursued goals of deterrence and punishment was sufficient to give their infringement a "criminal connotation", despite the fact that the legislature had sought to treat their breach as a "minor offence".[30]

Against this background, it is submitted that the Court of Justice, by relying not only on the classification of the sanction given to it by Union law, but also on other factors, such as whether the rules infringed were of specific as opposed to general application, and whether they were so "severe" as to justify considering them akin to other, more strictly "criminal", penalties (such as the deprivation of property or of personal freedom), sit squarely within established Convention standards[31] and confirm the ECJ's commitment to the principle of "homogeneity" between EU fundamental rights rules and ECHR principles.[32]

5.2. *The application of the principle of ne bis in idem with respect to parallel or subsequent proceedings at domestic and at Union level – Different goals?*

Having examined the approach adopted by the Court of Justice in respect of the notion of "criminal charge", this section will consider the ECJ's application of the *Engel* criteria to the proceedings at issue. It may be noted at the outset that the Strasbourg court has examined cases of parallel "regulatory" and "criminal" proceedings (defined in light of domestic law) in a number of areas. A useful parallel can be drawn with cases concerning the concurrent actions aimed at disqualifying company directors suspected of corporate misconduct and investigating allegations of such corporate misconduct, such as bankruptcy-related offences. In these circumstances, does the imposition of a criminal sanction either in parallel to or after the imposition of a "disqualification order" designed to prevent individuals accused of a similar offence from managing a commercial entity, infringe their right against double jeopardy?[33] According to the European Court of Human Rights, a distinction had to be drawn between, on the one hand, the criminal prosecution and, on the other hand, the "administrative" procedure aimed at

29. See Appl. No. 15963/90, *Gradinger* v. *Austria*, judgment of 23 Oct. 1995, available through the Hudoc website; see especially paras. 35–36.

30. Appl. No. 53785/09, *Tomasovic* v. *Croatia*, judgment of 18 Oct. 2011, available through the Hudoc website, paras. 20–23.

31. See paras. 37–44 of the judgment.

32. Opinion, para 43; see also paras. 37–44 of the judgment.

33. See e.g. Appl. No. 12277/04, *Storbraten* v. *Sweden*, [2007] 44 EHRR SE 24, p. 303.

the disqualification. It was acknowledged in the *Storbraten* decision that the actions leading to the conviction had also provided the rationale for the applicant's disqualification order.[34] However, the ECtHR emphasized that the measure of disqualification had been imposed as a result of a procedure having "predominantly civil-law features" and upon an assessment of whether the applicant " . . . due to unsound business conduct . . . [could] be presumed unfit for setting up or leading a company . . . ".[35] The criminal conviction, instead, was imposed after a fully adversarial process and after an assessment of all the relevant evidence; most importantly, it pursued a deterrent and punitive objective. As to the requirement of "severity", the Strasbourg Court also made clear that any "reputational damage" for the individual concerned, arising from the order, could not be regarded as being so serious as to warrant the conclusion that this measure was "criminal" in nature.[36]

In light of these findings, it may be argued that the question of what "objective" the parallel proceedings pursue once they are followed by a criminal action initiated for the same facts is decisive for the definition of the scope of the *ne bis in idem* principle: if these proceedings pursue purely "regulatory" goals, i.e. public interest aims that are relevant only to individuals enjoying a "special status" or having particular qualifications, then they will not be regarded as "criminal" and consequently will not trigger the application of the principle.[37]

The ECHR approach to this issue may now be compared with the EU law approach to the prohibition of double jeopardy, of which a good example can be found in the area of competition law.[38] In this context, the ECJ held as far back as in 1969 that the possibility of "concurrent sanctions" for the same set of allegations of anti-competitive behaviour under, respectively the EU and the domestic antitrust rules would not be inconsistent with the principle of *ne bis in idem*.[39] In its view, Article 101 TFEU and domestic competition law examined "cartels from different points of view": whereas the former is concerned with maintaining the steady flow of trade among Member States, the latter regards similar practices in light of considerations that are "peculiar" to a specific legal system.[40] Consequently, it was held that parallel

34. Ibid., p. 305.
35. Ibid., pp. 305–306.
36. Ibid., pp. 308–309.
37. Cf., *inter alia*, Appl. No. 36985/97, *Vastberga Taxi Aktiebolag* v. *Finland*, judgment of 23 July 2002, available through the Hudoc website; see especially paras. 75–82.
38. See e.g. Art. 3, Regulation 1/2003; see also Commission Notice on Cooperation within the Network of competition authorities (hereinafter referred to as Network Notice), O.J. 2004, C 101/43.
39. Case 14/68, *Walt Wilhelm* v. *BKAmt*, [1969] ECR 1, para 11; see also paras. 7–8.
40. Ibid., para 3.

investigation and imposition of penalties, respectively at EU and domestic level, would not be incompatible with the Treaty and its guiding principles, so long as the application of domestic law did not jeopardize the "full and uniform application of Community law" or the implementation of any measures adopted on that basis.[41] The Court also made clear that a "requirement of natural justice . . . demand[ed] that any previous punitive Decision must be taken into account in determining any sanction which is to be imposed."[42]

In light of the forgoing analysis, it is concluded that the approach adopted in *Bonda* remains broadly consistent with the interpretation of the principle of *ne bis in idem* adopted by the ECJ in other areas of EU law, such as competition law. The Court placed considerable emphasis on the need to establish the "identity of interest protected" in order for the principle to be applicable to the proceedings concerned.[43] The fact that the Polish legislature chose to introduce specific criminal sanctions for "fraudulent declarations" connected with applications for agricultural aid funded by the EU, did not call into question the "regulatory nature" of the exclusion from aid eligibility. The fact that the same objective of safeguarding the integrity of public budgets from these forms of fraud could have been pursued by relying on existing criminal offences did not alter that.[44]

5.3. *The principle of ne bis in idem in EU law after the Lisbon Treaty: The impact of the EU Charter and of the ECHR as "minimum standard"*

The Court did not expressly address the more general issues relating to the reach of the principle of *ne bis in idem* as protected by the general principles of EU law. Nor did the ruling answer the related question of the extent to which Article 50 of the EU Charter of Fundamental Rights could be applicable to the facts of the case: the Court, instead, seemed to accept that the issue of the "nature" of the sanction would only be relevant to the extent that it triggered the application of the prohibition of double jeopardy enshrined in domestic law. By contrast, these more general issues were dealt with by the Advocate General. In her Opinion, Advocate General Kokott first analysed whether, in light of Article 51 of the EU Charter, the facts of the case displayed a

41. Ibid., paras. 11–12.

42. Ibid., para 11; see also Joined Cases C-204/00 etc., *Aalborg Portland and others* v. *Commission*, [2004] ECR I-123, para 338; Joined Cases C-238/99 P etc., *Limburgse Vinyl Maatschappij and others* v. *Commission*, [2002] ECR I-8375, paras. 59, 96. More recently, see also *Toshiba*, cited *supra* note 5, paras. 81, 97–99 and 100–103, and Opinion in *Toshiba*, paras. 82–84.

43. Judgment, paras. 30–32; see also Opinion, paras. 18–19.

44. Opinion, paras. 19–20.

sufficient "connection with EU law" as to justify the application of the Union's own fundamental rights' standards;[45] it was held that since the sanction of exclusion from aid eligibility had been provided directly by EU legislation and the criminal penalties enshrined in Polish legislation had been introduced expressly in order to protect the Union budget after accession, this requirement was met.[46] Advocate General Kokott emphasized that the Polish authorities, when prosecuting an individual on suspicion of having committed subsidy fraud, should be subject to the fundamental rights safeguards provided in Union law on the ground that the offence aimed at deterring conduct injurious to the Union budget.[47]

Against this background the question arises whether, given the importance of the ECHR as a special "source of inspiration" for the construction of the EU general principles of law protecting fundamental rights, the ECJ's position is compatible with the ECHR rules protecting everyone against a second prosecution or conviction for the same offence. It is recalled that according to Article 52(3) of the EU Charter the scope of the right claimed by Mr Bonda should be assessed in light of the standards of protection provided for the principle of *ne bis in idem* by the ECHR. In the Advocate General's words, "... this follows from the requirement of homogeneity under which the rights contained in the Charter are to have the same meaning and scope as the corresponding rights guaranteed by the ECHR as interpreted" by the European Court of Human Rights.[48]

In general, the European Court of Human Rights has accepted that the same conduct may, in certain circumstances, represent two distinct criminal offences:[49] however, an individual can only be subjected to separate prosecutions for each offence if the two crimes do not share the same "nature and purpose".[50] It was also regarded as "desirable" that any lesser penalty should be absorbed into the larger sanction.[51] This approach was particularly apparent in the case law concerning the legitimacy of criminal proceedings brought against individuals who had already been subjected to measures seeking to prevent them from acting as company directors (briefly analysed in section 3.1 above). Whereas criminal sanctions for crimes of, *inter alia*, bankruptcy or misappropriation of funds had a deterrent and punitive function, director disqualification orders represented, in the ECtHR's view,

45. Opinion, para 15.
46. Ibid., para 16.
47. Ibid., paras. 17–18.
48. Ibid., para 37.
49. Appl. No. 25711/94, *Oliveira* v. *Switzerland*, [1999] 28 EHRR 289, paras. 26–28.
50. Appl. No. 37950/97, *Franz Fischer* v. *Austria*, judgment of 29 Aug. 2001, unreported, para 25; see also para 21.
51. Ibid., para 26; see also *Oliveira*, cited *supra* note 49, para 29.

interim measures designed to protect the company's funds and the interests of shareholders.[52]

In light of the foregoing analysis, it is submitted that the approach enshrined in *Bonda* remains consistent with the European Court of Human Rights case law on Article 4, Protocol VII to the ECHR. It is suggested that the two proceedings concerning Mr Bonda did not pursue the same "purpose".[53] One was punitive and deterrent in nature, and therefore belonged to the realm of criminal law. The other, instead, was indispensable for safeguarding the stability and good functioning of agricultural aid schemes, backed by the EU.[54] In addition, the circumstance that the penalty of exclusion from aid eligibility only affects a limited and well-identified category, namely applicants who have been previously found responsible for incorrect declarations[55] reinforces the view, adopted also by Advocate General Kokott, that in excluding "untrustworthy applicants" from being able to receive aid the Union legislature was not "concerned with subsequent disapproval of the conduct of the applicant …",[56] but only with minimizing risks for the solidity of the Union budget.[57]

This reading seems to be confirmed by the Court of Justice in the recent *Fransson* preliminary ruling, which concerned the parallel application of criminal and administrative penalties for the failure on the part of taxpayers to return correct VAT records.[58] Just as in *Bonda*, the Court held that it would only be "if the tax penalty [was] criminal in nature …", in accordance with the *Engel* criteria, and "[had] become final" that Article 50 of the EU Charter would prevent the same individual from being prosecuted and sanctioned again for the same conduct.[59] Thus it was concluded that Member States remained entitled to impose such "penalties" for the infringement of the VAT rules as they saw appropriate and would therefore be free to choose between laying down criminal penalties or administrative sanctions or "a combination of the two" without infringing the principle of *ne bis in idem*.[60]

52. See, *inter alia*, *Storbraten*, cited *supra* note 33, pp. 305–306.

53. See e.g. Appl. No. 15963/90, *Gradinger* v. *Austria*, judgment of 23 Oct. 1995, paras. 24–25.

54. Judgment, para 35; see also, *inter alia*, paras. 31, 39–44.

55. Judgment, paras. 28–29.

56. Opinion, para 64.

57. See Opinion, para 58.

58. Case C-617/10, *Aklagaren* v. *H. A. Fransson*, judgment of 26 Feb. 2013, nyr.

59. Ibid., paras. 34–35.

60. Ibid., paras. 33–34; see also paras. 36–37. For comment, see e.g. Hancox, "The meaning of "implementing" EU law under Article 51(1) of the Charter", 50 CML Rev. 1411–1432; Camacho Palma, "Aklagaren v. HA Fransson: Charter(ing) new territory", (2013) *British Tax Review*, 143–144.

5.4. *A taste of things to come? Ushering in the "homogeneity" of fundamental rights in the EU vis-à-vis the ECHR: The role of the "horizontal clauses" of the EU Charter*

This section briefly considers more general questions concerning the possible directions of the case law of the ECJ in the area of fundamental rights protection, such as how to read the EU Charter to ensure a homogenous and coherent standard of protection of human rights *vis-à-vis* the standards of the ECHR, both in respect of action taken by the Union institutions and measures adopted by the Member States to give effect to the Treaty objectives.

It is recalled that the "horizontal provisions" contained in the EU Charter have identified the ECHR as the "minimum standard" of protection for all the fundamental rights that are common to both instruments. Against this background, it may be argued that the position adopted in *Bonda* not only confirms the central role of the ECHR in shaping the interpretation of the EU human rights' catalogue, but also suggests that the "status" of the Convention has moved from being an "informal" "source of inspiration" (albeit admittedly a leading one), toward being progressively "incorporated" into Union law. [61] It is therefore submitted that the continued reliance on the part of the ECJ on the case law of the European Court of Human Rights confirms its commitment to securing an increasingly "consistent" standard of human rights' protection across the EU legal system, based on the Convention principles.[62]

Although this question was only examined in the Advocate General's Opinion, it should be emphasized that the *Bonda* case touched upon another important question, i.e. how to define the scope of applicability of the EU human rights' principles to Member States' measures adopted "within the scope of EU law", as prescribed by Article 51(1) of the EU Charter. It is clear that Article 51(1) confirmed that the demands of uniformity and coherence of fundamental rights' protection within Union law justified the application of these principles not only to review the legality of acts adopted by the EU bodies, but also to assess the validity of measures adopted by domestic authorities when acting within the spectrum of Union law.[63] This requirement was read flexibly by Advocate General Kokott who took the view that Article

61. Opinion, para 19; see also Opinion of A.G. Kokott in *Toshiba*, cited *supra* note 5, paras. 130–131 and 99–101.

62. Ibid., pp. 70–71.

63. See e.g. Case 5/88, *Wachauf*, [1989] ECR I-2609, para 19; Case C-260/89, *ERT*, [1991] ECR I-2925, para 42; Case C-2/92, *Bostock*, [1994] ECR I-955, paras. 15–17; more recently, Case C-540/03, *European Parliament* v. *Council*, [2006] ECR I-5769, paras. 22–23.

51(1) would be satisfied if the action of the domestic authorities had a "connection with Union law".[64]

In conclusion, it may be added that the EU Court, fully conscious of its role as ultimate "guardian" of the observance of this integral part of Union law, later expressly endorsed the view that application of EU law "[would entail] applicability of the fundamental rights guaranteed by the Charter" and consequently no "situations . . . [could] exist which are covered . . . by [EU law] without those fundamental rights being" also relevant.[65] Ensuring "homogeneity" of EU fundamental rights' standards *vis-à-vis* the ECHR principles is required by the horizontal provision of the Charter, which, in Article 52(3), expressly identifies the Convention as the source of the "minimum level of protection" for those rights that are provided by both instruments.[66]

5.5. *Of human rights and ne bis in idem after the Treaty of Lisbon: A complex picture? Tentative conclusions*

The previous sections analysed the preliminary ruling given in *Bonda* and highlighted how this decision has shed light on several questions concerning the meaning of the principle of *ne bis in idem* in Union law and, more generally, the scope of the EU fundamental rights *acquis vis-à-vis* domestic measures enacted "within the scope of Union law". As to the former, it was illustrated how the approach adopted by the ECJ was strongly anchored in the case law of the European Court of Human Rights, thus confirming the Luxembourg Court's commitment to the ECHR as "minimum standard" for the protection of human rights.[67] In respect of the ECJ's approach to determining the applicability of the principle of *ne bis in idem,* it was argued that the threefold test of unity of offender, of "material facts" and of interest protected was not only in keeping with the existing Union law *acquis*, but also compatible with the ECHR's Article 4, Protocol VII.[68] As a result, it was

64. Ibid., paras. 14–15. Cf. Explanations relating to the EU Charter of Fundamental Rights, O.J. 2007, C 303/32.

65. See e.g. *Fransson*, cited *supra* note 58, para 21. See *inter alia* Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 EuConst (2012), 381–382.

66. See e.g. Explanations on the Charter, cited. *supra* note 64, paras. 66–67; for commentary see Lock, "EU accession to the ECHR: Implications for judicial review in Strasbourg", 35 EL Rev. (2010), 782–783; also Jacqué, "The accession of the European Union to the European Convention on Human Rights and Fundamental freedoms", 48 CML Rev. (2011), 1016–1018.

67. Judgment, paras. 36–46.

68. See *inter alia* Appl. No. 25711/94, *Oliveira* v. *Switzerland*, [1999] 28 EHRR 289, paras. 26–28. Also, more recently, Appl. No. 11143/04, decision of the Court (Section I) of 1 Feb. 2007, *Mjelde* v. *Norway*, available via Hudoc website, part B.

suggested that imposing criminal sanctions and administrative penalties (either in parallel or subsequently) would not infringe the right not to be prosecuted and sanctioned twice for the same offence on account of the different objectives and differing nature and severity of each sanction.[69]

In light of the above, it is concluded that the *Bonda* preliminary ruling is something of a "test case" not just for appraising the confines of the principle of *ne bis in idem*, but also for "sounding the mood" of the ECJ as the Union moves toward accession to the European Convention on Human Rights. The preliminary ruling appears to "promise well" for the future directions of the EU Court's case law. The circumstance that the Court has recently re-examined these questions in line with *Bonda*[70] seems to accord with the demands of consistency in the protection of human rights across the whole spectrum of Union law, as well as with the principle of "subsidiarity" which underscores the ECHR itself and requires compliance with the Convention first and foremost within the contracting parties' jurisdiction.[71]

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69. Ibid.; see also Appl. No. 39031, *DC* v. *United Kingdom*, [2000] BCC 715–717.

70. *Fransson*, cited *supra* note 58, para 35.

71. See *inter alia* Appl. No. 14939/03, *Zolotukhin* v. *Russia*, [2012] 54 EHRR 16, see especially paras. 114–115.

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